FILED
JAN 10 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM 1954

No. 531

FIALER'S LIMOUSINES, INC. and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC., *Petitioners,*

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California, *Respondents.*

Petition for Writ of Certiorari to the Supreme Court of the State of California and the Public Utilities Commission of the State of California

ALLAN P. MATTHEW
WALKER W. LOWRY
ROLAND J. HENNING
1500 Balfour Building
351 California Street
San Francisco 4, California
Attorneys for Fialer's Limousines, Inc.

DOUGLAS BROOKMAN
1815 Mills Tower
San Francisco 4, California
Attorney for Airline Ground Transportation Association, Inc.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
1500 Balfour Building
351 California Street
San Francisco 4, California
Of Counsel.

January 7, 1955

PARKER PRINTING COMPANY, 150 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

	Page
Petition for Writ of Certiorari to the Supreme Court of the State of California and the Public Utilities Commission of the State of California	1
Opinions	2
Jurisdiction	2
Questions Presented	3
Statement of the Case	4
Reasons for Granting the Writ	8
1. Petitioners Have Not Been Heard	8
2. Petitioners Are Entitled Under the Constitution to a Hearing	12
3. Petitioners' Bus Properties Have Been Confiscated Contrary to Due Process of Law	13
4. The San Francisco-Barrett Contract Is Unlawful Under the Commerce Clause	14
5. The Supreme Court of California Should Be Directed to Consider and Decide the Question of the Validity of the San Francisco-Barrett Contract or Make Appropriate Arrangements for a Decision of that Question in Connection with These Proceedings	15
Conclusion	15
Appendix	

TABLE OF AUTHORITIES

Cases	Pages
Arizona Corporation Commission v. Hopkins, 79 P.2d 946 (Ariz. 1938)	5
Ashbacker Radio Co. v. F.C.C., 326 U.S. 327 (1945)	13
Barrett Garages, Inc., Application of, 53 Cal. P.U.C. 263 (1954); 53 Cal. P.U.C. 351 (1954)	2
Betts v. Roberts, 162 P.2d 423 (Ariz. 1945)	5
Bay Cities Transit Co. v. Los Angeles, 16 C.2d 772 (1940)	9
Chicago Junction Case, 264 U.S. 258 (1924)	10, 12, 13, 14
Corporation Commission v. Pacific Greyhound Lines, 94 P.2d 443 (Ariz. 1939)	5
Corporation Commission v. Southern Pac. Co., 191 P.2d 719 (Ariz. 1948)	5
Department of Banking v. Pink, 317 U.S. 264 (1942)	1
Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950)	9
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940)	11
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940)	15
Hovey v. Elliott, 167 U.S. 409 (1897)	2, 11, 12
Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88 (1913)	10, 14
Lutcher & Moore Lumber Co. v. Knight, 217 U.S. 257 (1910)	11
Morgan v. United States, 298 U.S. 468 (1936)	10
Morgan v. United States, 304 U.S. 1 (1938)	10, 12, 15
Northern Pacific R. Co. v. Department of Public Works, 268 U.S. 39 (1925)	10
Northwest Airlines v. Civil Aeronautics Board, 194 F.2d 339 (C.A.D.C. 1952)	13

Pages

Ohio Bell Tel. Co. v. Commission, 301 U.S. 292 (1937).....10, 12, 16
Oregon R.R. & N. Co. v. Fairchild, 224 U.S. 510 (1912)..... 10

Patton v. Administrator of Civil Aeronautics, ... F.2d .....
(C.A. 9, Sept. 21, 1954)..... 14
Phillips v. Commissioner, 283 U.S. 589 (1931)..... 9

R. R. Comm. v. Pacific Gas Company, 302 U.S. 388 (1938)..10, 12, 14
Railroad Commission v. Pullman Co., 312 U.S. 496 (1941)..... 15

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38
(1936) 10
Saunders v. Shaw, 244 U.S. 317 (1917)..... 7, 11
Southern Bus Lines v. Mississippi Public Service Commission,
50 So. 2d 149 (1951)..... 5
State v. Department of Public Works, 250 Pac. 1088 (Wash.
1926) 5
Symons Broadcasting Co. v. Federal Radio Commission, 64
F.2d 381 (C.A.D.C. 1933)..... 13

United States v. Abilene & So. Ry. Co., 265 U.S. 274 (1924).. 10

CONSTITUTION AND CODES

California Public Utilities Code:
Sec. 1031..... 4, 9
Sec. 1032..... 5, 12
Sec. 1033..... 7, 9
Sec. 1731..... 2
Sec. 1756..... 2

United States Code:
28 U.S.C. Sec. 1257..... 2

United States Constitution:
Commerce Clause
(Article I, Sec. 8, Cl. 3)..... 4, 7
Fourteenth Amendment.....7, 13, 14

In the Supreme Court of the United States

OCTOBER TERM 1954

No. .....

FIALER'S LIMOUSINES, INC. and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC.,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and the Public Utilities Commission of the State of California[1]

This petition raises the most fundamental of due process problems: the right to a hearing. In a case turning entirely on the effect of a contract, has a litigant been heard when the tribunal considering his rights first notes the argument that the contract is invalid, then expressly refuses to rule

1. This is a case in which the Supreme Court of California has refused to issue its writ to review a decision of the California Public Utilities Commission. The complete record is therefore in the files of the Commission, subject to the command of this Court. See *Department of Banking v. Pink*, 317 U.S. 264, 267 (1942).

on the question, announcing instead that it will "deem such contract valid" and on that assumption destroy the litigant's business? Is this due process of law? Respondents apparently think so. Petitioners think not. For as this Court held in *Hovey v. Elliott,* 167 U.S. 409, 446 (1897), the refusal "to consider the merits of a sufficient defence" is contrary to due process and tantamount to no hearing at all.

OPINIONS

The opinions of the California Public Utilities Commission on the case and denying rehearing are reported at 53 Cal. P.U.C. 263 and 53 Cal. P.U.C. 351. The order of the Supreme Court of California denying petitioners' application for a hearing in that court and denying reconsideration of the order were entered without opinion. The opinions of the Commission and the orders of the court are printed in the appendix.

JURISDICTION

This petition asks review by certiorari, under the provisions of 28 U.S.C. § 1257, of the order of the Supreme Court of California dated and entered October 13, 1954 (rehearing denied November 10, 1954) denying petitioners' application for a writ of review following a decision of the California Public Utilities Commission dated and entered July 6, 1954, rehearing denied July 20, 1954.[2]

---

2. Under California practice decisions of the state Public Utilities Commission are reviewed by the Supreme Court of California, in its discretion, upon application of the party aggrieved. California Public Utilities Code, Sec. 1756. An application for Supreme Court review can be filed only after a petition for rehearing has been presented to the Commisison. California Public Utilities Code, Sec. 1731. State procedures are not exhausted, therefore, until the Supreme Court of California has reviewed or refused to review the Commission decision. The state Supreme Court refused to hear this case on October 13, 1954 and refused to reconsider this action on November 10, 1954—all within ninety days from the date of this petition.

QUESTIONS PRESENTED

1. In a case in which the fundamental issue is the validity of a contract have petitioners been denied due process of law when the contract is *assumed* rather than decided to be valid and *on that basis* a decision rendered against them?

2. Does an administrative finding based on nothing but an invalid contract meet the due process requirement that findings must be supported by substantial evidence?

3. Does the refusal of the California Supreme Court to review a decision of the California Public Utilities Commission deny Fialer's Limousines, Inc. due process of law when the Commission

   (a) proceeding upon the theory that a single carrier must operate the ground transportation service between the San Francisco airport and neighboring cities and

   (b) conceding that Fialer's has provided and is providing a satisfactory service

   (c) nevertheless issues a certificate to a new applicant, Barrett Garages, Inc.

   (d) solely because of a contract between Barrett and San Francisco which purports to limit Fialer's access to the airport premises

   (e) but expressly refuses, although noting Fialer's argument that the contract is invalid, to rule on the validity of the contract, announcing instead that it will simply *assume* the contract valid and decide accordingly?

4. Under these circumstances have Fialer's bus properties employed in the airport service been confiscated contrary to due process of law?

5. Is a contract between San Francisco and Barrett which purports to give Barrett a monopoly of the trans-

portation service for all passengers, including passengers in interstate and foreign commerce, traveling from the San Francisco airport to cities in the San Francisco Bay Area unlawful under the Commerce Clause?

STATEMENT OF THE CASE

For more than twenty years petitioner Fialer's Limousines, Inc. has furnished for airline passengers a ground transportation service between the San Francisco airport and cities in the San Francisco Bay Area (Tr. 161). Since the airport is located several miles beyond the city limits this transportation service must operate over California state highways and accordingly it can be conducted only under the authority of a certificate issued by the California Public Utilities Commission. California Public Utilities Code, Sec. 1031. Fialer's now holds and for many years has held a certificate authorizing it to conduct the airport service (Tr. 162). Over the years Fialer's has paid San Francisco approximately ten per cent of the gross receipts from the service (Tr. 171, 172), a payment somewhat higher than is customary (Ex. No. 9, Tr. 444).

On April 7, 1954 San Francisco invited bids on a contract which purported to grant to the successful bidder certain exclusive parking and solicitation rights on the airport premises together with a complete monopoly of the outbound traffic (Tr. 5, Ex. No. 1, App. pp. 2-4). Fialer's bid 10 per cent (Tr. 29); Barrett Garages, Inc. bid 16.25 per cent and received the contract (Tr. 29). Fialer's was given no opportunity to meet the Barrett price.[3]

---

3. In order to protect the investment of the existing operator statutory provisions virtually identical with the California Code sections have been held to mean that a new operator may obtain a certificate only after the Commission has found deficiencies in the service and the operator conducting the service has refused to obey

In due course Barrett filed applications with the California Public Utilities Commission for certificates authorizing it to operate the airport service. Fialer's filed a protest (Tr. 160). Petitioner Airline Ground Transportation Association, Inc., a national association of carriers furnishing transportation to and from airports, joined in the protest on the ground that any attempt by cities such as San Francisco to sell the right to conduct the airport service to the highest bidder would inevitably inflate the cost of the service to the ultimate detriment of both the carriers and the traveling public (Tr. 310, 441-445).

Under Section 1032 of the California Public Utilities Code the certificate authorizing Barrett to enter the service could issue only upon a finding by the Commission, "after hearing," that Fialer's "will not provide such service to the satisfaction of the commission."[4] The evidence adduced at

---

a Commission order directing that deficiencies be corrected. *Arizona Corporation Commission v. Hopkins*, 79 P.2d 946, 947 (Ariz. 1938); *Betts v. Roberts*, 162 P.2d 423, 424 (Ariz. 1945); *Corporation Commission v. Pacific Greyhound Lines*, 94 P.2d 443, 451 (Ariz. 1939); *Corporation Commission v. Southern Pac. Co.*, 191 P.2d 719, 723 (Ariz. 1948); *State v. Department of Public Works*, 250 Pac. 1088, 1089 (Wash. 1926); *Southern Bus Lines v. Mississippi Public Service Commission*, 50 So. 2d 149, 152 (1951). There is no California decision on the point.

4. Section 1032 reads:

"Every applicant for a certificate shall file in the office of the commission an application therefor in the form required by the commission. The commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the commission."

the hearing in support of the Barrett application consisted of the San Francisco-Barrett contract and testimony that there was room for only one carrier in the service (Tr. 14, 48, 55). The evidence on behalf of Fialer's consisted of uncontradicted testimony that the Fialer's service was and always had been entirely satisfactory (Tr. 39, 195, 198, 203, 283, 293, 302).

On July 6, 1954 the Commission granted the Barrett application on the ground that since the San Francisco-Barret contract undertook to exclude Fialer's from the airport premises for solicitation and parking purposes and purported to grant to Barrett a monopoly of the outbound traffic, Fialer's would not be in a position to provide a satisfactory airport service. The Commission noted Fialer's argument that the San Francisco-Barrett contract was invalid

> "Fialer's Limousines, Inc., takes the position that the City and County of San Francisco cannot, by the contract with applicant, properly undertake to exclude Fialer's from utilizing the roads and terminal facilities within the Airport in a manner convenient for its airline passengers, and that Section 1032 of the Public Utilities Code requires that the Commission deny the applications." (App. pp. 6, 7.)

but refused to consider or determine that question, saying in that connection:

> "The Commission is not here required to construe the legality of the ground transportation service contract entered into by the City and County of San Francisco and the applicant on May 18, 1954. The Commission for the purpose of this proceeding may deem such contract valid." (App. p. 7.)

The contract thus "deemed"—but not decided—to be valid was the sole basis for the Commission decision.

In petitioning for rehearing, Fialer's again pointed out that the San Francisco-Barrett contract, to the extent it undertook to interfere with the airport operation conducted by Fialer's under the authority of the State of California, was plainly illegal and void under the provisions of Section 1033 of the California Public Utilities Code and repeated decisions of the California Supreme Court. On July 20, 1954 the Commission denied the petition for rehearing, again without considering or determining the validity of the San Francisco-Barrett contract (App. pp. 10-12). The Supreme Court of California refused on October 13, 1954 to hear the case (App. p. 12) and on November 10, 1954 refused to reconsider this action (App. p. 13).

The federal questions were presented in timely fashion. The Commission in its first opinion notes that Fialer's challenged the validity of the San Francisco-Barrett contract (App. pp. 6, 7); and when the Commission assumed rather than decided that the contract was valid Fialer's, in petitioning for rehearing, pointed out the plain violation of the due process requirements of the Fourteenth Amendment.[5] This is timely. *Saunders v. Shaw,* 244 U.S. 317, 320 (1917). Fialer's again relied on the Fourteenth Amendment in its petition for a hearing in the California Supreme Court[6] and repeated its due process arguments in its rehearing petition.[7] That petition also made the point that to the extent the San Francisco-Barrett contract attempts to control travel of passengers moving in interstate and foreign commerce, it is invalid under the Commerce Clause.[8]

---

5. See Section V of Fialer's argument in support of its request for rehearing.

6. See Section IX of the petition and Section V of the supporting memorandum of points and authorities.

7. See the argument on p. 10 of the petition entitled "The Commission Decision Is Contrary to Due Process of Law".

8. See pp. 9-10 of the petition.

REASONS FOR GRANTING THE WRIT

1. Petitioners Have Not Been Heard.

It seems as clear as anything is likely to be that petitioners have never been heard in this case on the only issue that really matters, that there has been no decision anywhere on the question which really counts: is the San Francisco-Barrett contract valid? Barrett says it is and offers the contract as the sole reason why Barrett and not Fialer's should operate the airport service. Fialer's says the contract is invalid and cannot therefore furnish a basis for the Commission order putting the airport service in the hands of Barrett. The Commission notes the argument against the validity of the contract (App. pp. 6, 7), refuses, however, to rule on the question (App. p. 7), announces instead that "The Commission for the purpose of this proceeding may deem such contract valid" (App. p. 7), and on that assumption finds that Fialer's cannot provide a satisfactory service (App. p. 7), and therefore that a certificate must issue to Barrett (App. p. 7). A more flagrant disregard of the due process obligation to hear, consider and decide on a rational basis is difficult to imagine. A court might, with equal justification, conduct a murder case by deeming "for the purpose of this proceeding" that the defendant killed the deceased or a tort case by deeming "for the purpose of this proceeding" that the defendant had been negligent.

Why the Commission thought it could not decide but had to assume that the San Francisco-Barrett contract was valid no one knows: perhaps because of some mistaken idea as to what sort of questions were appropriate for Commission decision. Nor would the Commission's attitude greatly matter if the California Supreme Court had been willing

to hear the case.[9] But the California Supreme Court refused, without opinion or explanation, to issue its writ. The consequence is that Fialer's has found no one to hear its contention that the contract is invalid, a contention which finds explicit and unequivocal support in the California Codes and the decisions of the California Supreme Court.[10] The Commission, summarily "deeming" the contract valid, has refused to consider either the Code sections or the decisions and the California Supreme Court by denying

---

9. Compare the decisions which hold that an administrative tribunal may act in summary fashion provided that a full hearing is granted before the action is final. *Phillips v. Commissioner*, 283 U.S. 589, 597 (1931); *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 599 (1950).

10. If Fialer's can find someone willing to listen the invalidity of the San Francisco-Barrett agreement can be quickly demonstrated. For example:

(a) The contract, when it was presented to the Commission, was void because it purported to call for a passenger stagecoach operation over California highways by a carrier holding no certificate. See Section 1031 of the California Public Utilities Code.

(b) The contract, to the extent it purports to interfere with the airport service Fialer's conducts under the authority of a Commission certificate, is invalid under Section 1033 of the California Public Utilities Code. That section provides that in the event of conflict between municipal action, such as the Barrett contract, and rights granted under a Commission certificate, such as the certificate authorizing Fialer's to conduct the airport operation, the certificate provisions control. The Code section authorizes the Commission to grant certificates and make orders "affecting passenger stage corporations, notwithstanding the provisions of any ordinance or permit of any city, county, or city and county, and *in case of conflict* between any such order or rule and any such ordinance or permit, *the certificate, decision, order, or rule of the commission shall prevail.*" (Emphasis supplied.)

(c) The Supreme Court of California has repeatedly held that in the event of conflict or inconsistency between municipal action and rights granted by the State of California acting through the Public Utilities Commission, the municipal action is void. See, for example, *Bay Cities Transit Co. v. Los Angeles*, 16 C.2d 772, 777 (1940).

its writ has made effective the Commission refusal to hear petitioners.

That this combined administrative-judicial action is contrary to due process of law and the decisions of this Court scarcely needs arguing. Over and over again this Court has insisted that state administrative and judicial tribunals must so conduct their affairs that the fundamentals of due process are fully observed. "The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *R. R. Comm. v. Pacific Gas Company,* 302 U.S. 388, 393 (1938).[11] Due process means the regular, orderly process of the law: full hearing, full consideration and rational decision. It means, of course, that every party to the proceeding must be given an adequate opportunity to make his case.[12] But it also means that the tribunal hearing the matter must give effect to the case thus made. *"It* [the carrier] *must be given the opportunity by proof and argument to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established." Oregon R. R. & N. Co. v. Fairchild,* 224 U.S. 510, 525 (1912). *"To refuse to consider evidence* introduced or to make an essential finding without supporting evidence *is arbitrary action." Chicago Junction Case,* 264 U.S. 258, 265 (1924). "To be sure, the laws under which these agencies operate prescribe the fundamentals

---

11. See also *Ohio Bell Tel. Co. v. Commission,* 301 U.S. 292, 304 (1937); *Northern Pacific R. Co. v. Department of Public Works,* 268 U.S. 39, 45 (1925).

12. See *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U.S. 88, 93 (1913); *United States v. Abilene & So. Ry. Co.,* 265 U.S. 274, 288 (1924); *Morgan v. United States,* 298 U.S. 468, 480 (1936); *Morgan v. United States,* 304 U.S. 1, 15 (1938); *St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 73 (1936).

of fair play. *They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion." Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 143 (1940). Since due process requires a hearing "before a tribunal bound not only to listen but to give legal effect to what has been established," since that tribunal may not "refuse to consider evidence" or argument and since its "judgment must express a reasoned conclusion," it is evident that there is no room within the limits of due process for assumptions about, rather than decisions upon, the issues between the parties.

Whenever it turns out, therefore, as in this case, that a litigant's evidence and arguments have not been fully and fairly considered, this Court has been quick to recognize a violation of due process requirements. In *Lutcher & Moore Lumber Co. v. Knight,* 217 U.S. 257, 267 (1910), where the defendant argued successfully in an equity case that plaintiff's claim could be heard only at law and in a subsequent law case that it could be heard only in equity, this Court reversed the decision below pointing out that plaintiffs, for all practical purposes, had been denied a hearing. In *Saunders v. Shaw,* 244 U.S. 317 (1917), the appellate court reached its decision on the assumption certain lands were not benefited by a drainage district program. The trial court had excluded evidence on this point. This Court held that for the appellate court to rule without considering that evidence was contrary to due process. In *Hovey v. Elliott,* 167 U.S. 409, 446 (1897), the trial court, as punishment for contempt, struck defendant's answer from the file and gave judgment for plaintiff. This was held to violate due process requirements and the Court said:

> "* * * There is no distinction in principle between determining a cause upon issues not raised by the pleadings

> in the actual absence of the party, and *rendering a decree by refusing* to permit a defendant to be heard in his defence or *to consider the merits of a sufficient defence,* and, indeed, by striking the pleading containing such defence from the files." (Emphasis supplied.)

The California Commission and the California Supreme Court have done the identical thing which the *Hovey* case condemns, that is, they have refused "to consider the merits of a sufficient defence."

2. Petitioners Are Entitled Under the Constitution to a Hearing.

Under Section 1032 of the California Public Utilities Code a certificate could issue to Barrett authorizing it to enter the airport service only "after hearing."[13] This means a full and fair hearing sufficient to meet due process requirements. *Chicago Junction Case,* 264 U.S. 258, 265 (1924); *Morgan v. United States,* 304 U.S. 1, 15 (1938). But the right of petitioners to be heard has a higher source than the California Code. It has long been recognized that under the Fourteenth Amendment state administrative and judicial practice must meet due process requirements. *R. R. Comm. v. Pacific Gas Company,* 302 U.S. 388, 393 (1938); *Ohio Bell Tel. Co. v. Commission,* 301 U.S. 292, 304 (1937). Moreover, this is not a case in which petitioners' injury results only from competition made possible by the grant of a certificate to a competitor. The San Francisco-Barrett contract does not contemplate that Fialer's and Barrett will

---

13. Section 1032 provides in part:
"* * * The commission may, *after hearing,* issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the commission." (Emphasis supplied.)

both operate in the airport service. It contemplates that Fialer's will be excluded from that service. The Barrett witnesses so testified and the Commission accepted this conclusion.[14] Barrett does not, therefore, seek to compete with Fialer's. Barrett expects to displace Fialer's, a program which the Commission has in effect approved. Under these circumstances the right of Fialer's to invoke the due process provisions of the Fourteenth Amendment is clear. *Chicago Junction Case,* 264 U.S. 258, 266 (1924).[15]

3. Petitioners' Bus Properties Have Been Confiscated Contrary to Due Process of Law.

The immediate consequence of the action of the Commission in assuming the validity of the San Francisco-Barrett contract, accepting the testimony of the Barrett witnesses that only one operator can effectively serve the airport and in granting a certificate to Barrett to provide that service is that the Fialer's bus properties, heretofore devoted to the airport service have lost most of their value. Prior to the Commission order Fialer's employed in the airport service

---

14. The Commission said:

"Air-lines representatives employed at the San Francisco Airport were called as witnesses by applicant. Their testimony generally was to the effect that it would not be practicable to utilize one ground transportation company for the transportation of their airline passengers from the Airport and to use another for transportation to the Airport and that a single transportation company operating in both directions was preferable." (App. p. 5.)

15. Compare the decisions holding that in the event of mutually exclusive applications to an administrative agency neither can be granted without hearing both applicants. *Ashbacker Radio Co. v. F. C. C.,* 326 U.S. 327, 333 (1945); *Northwest Airlines v. Civil Aeronautics Board,* 194 F.2d 339, 344 (C.A.D.C. 1952); *Symons Broadcasting Co. v. Federal Radio Commission,* 64 F.2d 381, 382 (C.A.D.C. 1933).

approximately twenty-four units of equipment representing an investment of $250,000. That equipment has today, as a result of the Commission action, only such value as it may command on the second-hand market, a mere fraction of its going concern value. Due process of law contemplates and requires that administrative action having this effect be supported by substantial evidence. There is no such evidence in this record. The Commission offers nothing in justification of its order save the San Francisco-Barrett contract. That contract, for the reasons noted, is invalid. An invalid contract is not evidence. It is nothing at all and a finding which is not supported by evidence is contrary to the Fourteenth Amendment and, to the extent it affects property rights, confiscatory. *Chicago Junction Case,* 264 U.S. 258, 265 (1924); *Interstate Commerce Commission v. Louisville & Nashville R. Co.,* 227 U.S. 88, 91 (1913); *R. R. Comm. v. Pacific Gas Co.,* 302 U.S. 388, 393 (1938).

4. The San Francisco-Barrett Contract Is Unlawful Under the Commerce Clause.

The San Francisco Airport is one of the most important air gateways to the United States and a principal terminus for transcontinental air traffic. This means that a great number of the passengers moving to and from the airport are traveling in an interstate journey. By its contract with Barrett, San Francisco has undertaken to grant to Barrett a monopoly of this interstate and foreign passenger traffic. The Court of Appeals for the Ninth Circuit has recently recognized that any local effort to create a monopoly of interstate passenger traffic at airports may well be "deemed arbitrary and unreasonable interference with interstate and foreign commerce". See *Patton v. Administrator of Civil Aeronautics,* ..... F.2d ..... (C.A. 9, September 21, 1954).

5. The Supreme Court of California Should Be Directed to Consider and Decide the Question of the Validity of the San Francisco-Barrett Contract or Make Appropriate Arrangements for a Decision of That Question in Connection with These Proceedings.

As far as petitioners can see there is no reason why the Supreme Court of California should not now decide the question of the validity of the San Francisco-Barrett contract and, if it agrees with petitioners, nullify the Commission order as being without support in the evidence and contrary to law. San Francisco and Barrett, the contracting parties, have participated in this proceeding throughout and they would participate no doubt in the hearing before the Supreme Court of California. If, however, there is some objection to this procedure, the California Supreme Court should direct the California Commission to revoke its order dated July 6, 1954 granting the Barrett application and retain the matter on its docket undecided until petitioners, in such litigation as may be appropriate, have an opportunity to test the validity of the San Francisco-Barrett contract. Compare the practice of this Court in directing a District Court to retain litigation on its docket pending appropriate action by an administrative tribunal (*General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940), or a state court (*Railroad Commission v. Pullman Co.*, 312 U.S. 496, 501 (1941)).

CONCLUSION

It is the settled doctrine of this Court that "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority." *Morgan v. United States*, 304 U.S. 1, 22 (1938). And, as Mr.

Justice Cardozo pointed out in *Ohio Bell Tel. Co. v. Commission,* 301 U.S. 292, 304 (1937), the very fact that so much "within the realm of administrative discretion is exempt from supervision" means that: "All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity." Here there has been no such hearing. Here, whether by accident or design, the administrative-judicial process has worked the complete destruction of Fialer's business without at any time providing Fialer's an opportunity to be heard on the fundamental issue for decision. This is not due process of law.

Dated: January 7, 1955.

Respectfully submitted,

ALLAN P. MATTHEW
WALKER W. LOWRY
ROLAND J. HENNING
Attorneys for
Fialer's Limousines, Inc.

DOUGLAS BROOKMAN
Attorney for Airline
Ground Transportation
Association, Inc.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel.

(Appendix follows)

APPENDIX

Decision No. 50229

Before the Public Utilities Commission of the State of California

In the Matter of the Application of BARRETT GARAGES, INC., a corporation, for a Certificate of Public Convenience and Necessity authorizing it to operate as a passenger stage corporation from the San Francisco International Airport, San Mateo County, California, to the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California.	Application No. 35454
In the Matter of the Application of BARRETT GARAGES, INC., a corporation, for a Certificate of Public Convenience and Necessity authorizing it to operate as a passenger stage corporation from the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California, to the San Francisco International Airport, San Mateo County, California.	Application No. 35462

James Farraher, Geo. A. Stockfleth and *Reginald L. Vaughan,* for applicant.

McCutchen, Thomas, Matthew, Griffiths and Greene, by *Allan P. Matthew* and *Roland J. Henning,* for Fialer's Limousines, Inc., protestant.

Douglas Brookman, for Airline Ground Transportation Association, Inc., protestant.

OPINION

Barrett Garages, Inc., by the above-numbered applications requests a certificate of public convenience and necessity authorizing it to operate a passenger stage corporation for the transportation of passengers and their baggage between San Francisco International Airport, San Mateo County, California, and the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California, with no service to intermediate or off-route points. By stipulation, filed herein, Barrett Garages, Inc., restricted the scope of its application to the transportation of passengers having prior or subsequent transportation by air and any person accompanying such passenger. The granting of the application was protested by Fialer's Limousines, Inc., and Airline Ground Transportation Association, Inc.

Public hearings were held at San Francisco before Examiner Silverhart.

On May 18, 1954, the City and County of San Francisco acting through its Public Utilities Commission entered into a contract with Barrett Garages, Inc., concerning ground transportation of passengers arriving at or departing from the San Francisco International Airport.[1]

Such contract provides, among other things, so far as pertinent here, that:

1. Barrett Garages, Inc., shall have the sole and exclusive privilege to conduct a ground transportation service for air-line passengers between the Airport and points outside its limits, provided that such transportation originates on or about the Airport premises.

---

1. The Municipal Airport operated on behalf of the City and County of San Francisco by its Public Utilities Commission.

2. In connection with such service Barrett Garages, Inc., shall have:
   (a) The use of paved areas on the Airport to which it may be assigned by the San Francisco Public Utilities Commission for parking its vehicles.
   (b) The use of designated roads and driveways of the Airport as authorized by such Commission for the conduct, operation and maintenance of such service.
   (c) The use of space in the Terminal Building[2] for the conduct, operation and maintenance of its offices.
   (d) The right to install and operate signs on the Airport for the purpose of identifying it and informing the public of the service offered by it.

3. Barrett Garages, Inc., shall pay a fee of sixteen and 25/100th per cent (16.25%) of the gross revenues received through the operation of such service (including the gross revenues derived from the operation of its metered taxicabs and chauffeur-driver limousines) or the sum of $48,000 per year, whichever is the greater.
4. The San Francisco Public Utilities Commission shall:
   (a) Prohibit any carrier other than Barrett Garages, Inc., from loading or picking up passengers for hire in vehicles used primarily for the transportation of airline passengers within the confines of the Airport, except licensed public interurban bus carriers operating on a regular

2. The newly constructed Terminal Building is located approximately one mile distant from the existing airport terminal and approximately ¾ of a mile from the new Bayshore Freeway.

schedule under State authority and loading and unloading at stops other than loading areas assigned to Barrett Stages, Inc.

(b) Shall not license or permit any such interurban bus carrier to load or unload on the loading or unloading platforms or ramps of the Terminal Building.

(c) Shall prohibit any person, firm, or corporation conducting the type of service exclusively reserved to Barrett Garages, Inc., from using space in the Terminal Building, or from installing signs, or having starters, guides, clerks and solicitors in the Airport.

5. The term of the agreement shall commence on the first day of operation of the Terminal Building and shall end ten years thereafter unless service is terminated by the happenings of certain events therein set forth.

In the conduct of the proposed service, applicant plans to utilize 18 airline motor buses, each of 29- to 33-passenger capacity. Applicant proposes to operate schedules so as to coincide with the arrivals and departures of airplanes carrying passengers to and from the Airport. An on-call service also will be rendered. The rates as proposed range from a one-way adult fare of $1.09 between San Francisco and the San Francisco International Airport to a one-way adult fare of $2.18 between Palo Alto and the Airport. Children under 5 years of age when accompanied by an adult passenger and not occupying seats to the exclusion of other passengers, will be transported free of charge. Children under 5 years of age occupying seats to the exclusion of other passengers and children 5 years and under 12 years of age when accompanied by an adult passenger, will be charged one-half of the adult fare.

The record discloses that applicant possesses adequate financial resources and the requisite ability to institute and maintain the proposed service.

The utilities manager of the San Francisco Public Utilities Commission testified that the City and County of San Francisco awarded the contract to Barrett Garages, Inc., as the highest responsible bidder pursuant to competitive bidding in which Fialer's Limousines, Inc., participated. According to the witness the Airport is owned in fee simple by the City and County of San Francisco. He stated that roads therein were not dedicated as public highways and would be used only for Airport business, subject to the complete control of the San Francisco Public Utilities Commission. His testimony further showed that applicant would be permitted the exclusive use of the roads leading to and from the terminal building and of the passenger loading and unloading ramps joined to such building in connection with ground transportation originating at the Airport.

Air-lines representatives employed at the San Francisco Airport were called as witnesses by applicant. Their testimony generally was to the effect that it would not be practicable to utilize one ground transportation company for the transportation of their airline passengers from the Airport and to use another for transportation to the Airport and that a single transportation company operating in both directions was preferable. These witnesses indicated that they were satisfied with the service as heretofore rendered by Fialer's Limousines, Inc., and desired the continuance of a satisfactory service.

Fialer's Limousines, Inc., (in addition to other points) is presently certificated to transport air-line passengers in both directions between the City of Oakland and the San Francisco Municipal Airport in San Mateo County, between

San Francisco and San Francisco Municipal Airport (Mills Field) San Mateo County, and between San Francisco Municipal Airport (Mills Field) on the one hand, and on the other hand Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto.

Fialer's Limousines, Inc., now conducts and has conducted a service to and from the San Francisco Municipal Airport for many years past. In July 1950 the City and County of San Francisco awarded Fialer's Limousines, Inc., a contract, the term of which has now terminated,[3] governing transportation services at and from the Airport. The provisions of such contract with reference to exclusive privileges within the Airport are substantially similar to those contained in the contract presently held by applicant.

The president of Fialer's Limousines, Inc., testified as to the points it serves, its methods of operation, and the equipment and facilities it utilizes in the conduct of its airline passenger transportation service.

The witness stated that service to and from the Airport should be an integrated service in charge of one operator.

Representatives of air lines operating to and from the Airport testified upon behalf of Fialer's Limousines, Inc. Their testimony revealed that while they consider the service furnished by Fialer's satisfactory and intend to continue its use, such service would not be satisfactory if Fialer's was unable to obtain convenient access to the passenger loading and unloading ramps at the Terminal Building.

Fialer's Limousines, Inc., takes the position that the City and County of San Francisco cannot, by the contract with applicant, properly undertake to exclude Fialer's from util-

3. The contract provides that it shall terminate three years after its date. Any holding over of the three-year period shall be on a month to month basis only. Such month to month arrangement is presently in effect.

izing the roads and terminal facilities within the Airport in a manner convenient for its air-line passengers, and that Section 1032[4] of the Public Utilities Code requires that the Commission deny the applications.

The Commission is not here required to construe the legality of the ground transportation service contract entered into by the City and County of San Francisco and the applicant on May 18, 1954. The Commission for the purpose of this proceeding may deem such contract valid. The circumstances here presented warrant the conclusion and we find that Fialer's Limousines, Inc., will not be able to provide a ground transportation service in connection with the San Francisco International Airport to our satisfaction.

The record clearly demonstrates that a satisfactory ground transportation service is necessary in connection with the San Francisco International Airport. Upon full consideration of the record we find that public convenience and necessity require the establishment and operation of the service proposed by applicant.

Applicant is hereby placed upon notice that operative rights, as such, do not constitute a class of property which may be capitalized or used as an element of value in rate-fixing for any amount of money in excess of that originally

---

4. Section 1032 reads as follows:
Every applicant for a certificate shall file in the office of the Commission an application therefor in the form required by the Commission. The Commission may, with or without hearing, issue the certificate as prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The Commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the Commission.

paid to the State as the consideration for the grant of such rights. Aside from their purely permissive aspect, they extend to the holder a full or partial monopoly of a class of business over a particular route. This monopoly feature may be changed or destroyed at any time by the State, which is not in any respect limited to the number of rights which may be given.

ORDER

Public hearings having been held and based upon the evidence therein adduced,

IT IS ORDERED:

(1) That a certificate of public convenience and necessity is granted to Barrett Garages, Inc., a corporation, authorizing the establishment and operation of a service as a passenger stage corporation as that term is defined in Section 226 of the Public Utilities Code, for the transportation of passengers and their baggage between San Francisco International Airport, San Mateo County, on the one hand, and the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, on the other hand, provided, however, no passengers shall be transported except those who have prior or subsequent transportation by air to or from the San Francisco International Airport and any person accompanying such passenger.

(2) That in providing service pursuant to the certificate herein granted, applicant shall comply with and observe the following:

1. Applicant shall file a written acceptance of the certificate herein granted within a period of not to exceed 30 days from the effective date hereof.

2. Within 60 days from the effective date hereof and on not less than 5 days' notice to the Commission and the public, applicant shall establish the service herein authorized and file in triplicate and concurrently make effective, tariffs and timetables satisfactory to the Commission.
3. Subject to the authority of this Commission to change or modify them by further order, applicant shall conduct operations pursuant to the certificate herein granted over and along the following routes:
   a. Between San Francisco International Airport and San Francisco via U. S. Highways 101 and 101 alternate.
   b. Between San Francisco International Airport and Oakland via U. S. Highways 101 and 101 alternate to San Francisco thence via and along the most appropriate San Francisco city streets, and San Francisco-Oakland Bay Bridge.
   c. Between San Francisco International Airport and Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto via U. S. Highways 101 and 101 alternate.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 6th day of July, 1954.

PETER E. MITCHELL
President
JUSTUS F. CRAEMER
KENNETH POTTER
VERNE SCOGGINS
Commissioners

Decision No. 50286

Before the Public Utilities Commission of the State of California

In the Matter of the Application of BARRETT GARAGES, INC., a corporation, for a Certificate of Public Convenience and Necessity authorizing it to operate as a passenger stage corporation from the San Francisco International Airport, San Mateo County, California, to the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California.	Application No. 35454
In the Matter of the Application of BARRETT GARAGES, INC., a corporation, for a Certificate of Public Convenience and Necessity authorizing it to operate as a passenger stage corporation from the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California, to the San Francisco International Airport, San Mateo County, California.	Application No. 35462

Order Denying Petitions for Rehearing and Reconsideration

Protestants Fialer's Limousines, Inc., and Airline Ground Transportation Association, Inc., have filed petitions for rehearing and reconsideration respecting Decision No. 50229, rendered herein on the 6th day of July, 1954, whereby the applicant in the above-entitled proceedings was granted a certificate of public convenience and necessity to operate between the points and places as a passenger stage corporation as in said decision authorized and prescribed.

The Commission has carefully considered the points raised in said petitions. The points therein raised merely restate the matters contended for by petitioners during the hearing of these proceedings. No useful purpose could be served by restating these contentions as they were adequately covered and considered by the decision herein assailed by the instant petitions. In our opinion, the authorities cited by petitioners do not support their contentions.

Petitioners do not desire to introduce additional evidence but ask for argument before the Commission in bank.

Apparently, petitioners misconceive the issues of law involved herein.

The instant proceedings present no constitutional issues. The finding of the Commission on the question of public convenience and necessity is not subject to judicial review. (*Pacific Greyhound Lines v. Railroad Commission,* 11 Cal. (2d) 427, 429; *San Diego etc. Ferry Co. v. Railroad Commission,* 210 Cal. 504, 510, 513; *Oro Electric Corp. v. Railroad Commission,* 169 Cal. 466, 471; *Ashbury Truck Co. v. Railroad Commission,* 52 Fed. (2d) 263, 267 (affirmed per curiam by the Supreme Court of the United States, 287 U.S. 570, 77 L.ed. 501).) The scope of review of decisions of this Commission was not broadened by the 1933 amendment to Section 67 of the Public Utilities Act (now Section 1760, Public Utilities Code). (*Southern California Edison Co. v. Railroad Commission,* 6 Cal. (2d) 737, 748-749.) It is elementary that the granting or withholding of a certificate of public convenience and necessity is a legislative act which rests in the discretion of this Commission. Such action presents no question which is subject to judicial review. (*Ashbury Truck Co. v. Railroad Commission,* supra, p. 267.) The Commission may grant a number of certificates covering the same route or routes.

In light of the foregoing authorities and the facts of record, we perceive no merit in the petitions herein. Accordingly, said petitions for rehearing and reconsideration are hereby denied.

Dated, San Francisco, California, this 20th day of July, 1954.

PETER E. MITCHELL
President

JUSTUS F. CRAEMER
KENNETH POTTER
VERNE SCOGGINS
Commissioners

ORDER DENYING WRIT OF REVIEW

S. F. No. 19113

In the Supreme Court
of the
State of California
In Bank

Fialers Limousines, Inc., et al
v.
Public Utilities Commission, etc., et al

Petition for writ of review DENIED.

GIBSON
Chief Justice

Filed: OCT 13 1954 William I. Sullivan, Clerk
By J. M. Rogers S. F. Deputy

Order due November 12, 1954

ORDER DENYING REHEARING

S. F. No. 19113

In the Supreme Court
of the
State of California
In Bank

Fialers Limousines, Inc., et al

v.

Public Utilities Commission, etc., et al

Petitioners' application for rehearing DENIED.

GIBSON
Chief Justice

Filed: NOV 10 1954 William I. Sullivan, Clerk
By Joseph M. Rogers S. F. Deputy

FILED
FEB 1 1955
HAROLD B. WILLEY, C

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1954

No. 531

FIALER'S LIMOUSINES, INC. and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC.,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California and the Public Utilities Commission of the State of California.

BRIEF FOR RESPONDENTS IN OPPOSITION.

EVERETT C. MCKEAGE,
Chief Counsel,
RODERICK B. CASSIDY,
Assistant Chief Counsel,
HAROLD J. MCCARTHY,
Senior Counsel,
HALSEY L. RIXFORD,
Assistant Counsel,
514 State Building, San Francisco 2, California,
Attorneys for Respondents.

Table of Authorities Cited

Cases	Pages
Black and White T. & T. Co. v. Brown and Yellow T. & T. Co., 276 U.S. 518, 72 L. ed. 681	12
Bluefield Water Works, etc., Co. v. Public Service Comm., 262 U.S. 679, 67 L. ed. 1176	20
Chicago Junction Case (The), 264 U.S. 258, 68 L. ed. 667	16
Coleman v. City of Oakland, 110 Cal. App. 715, 295 P. 59	9
Demeter v. Annenson, 80 Cal. App. (2d) 48, 180 P. (2d) 998	12
Donovan v. Pennsylvania Co., 199 U.S. 279, 50 L. ed. 192	10
East New York Savings Bank v. Hahn, 326 U.S. 230, 90 L. ed. 34	19
Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 88 L. ed. 333	19
Grand Trunk Western Ry. Co. v. Railroad Comm. of Indiana, 221 U.S. 400, 55 L. ed. 786	20
Hanlon v. Eshleman, 169 Cal. 200, 146 P. 656	17
Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 56 P. 893	10
Home Building and Loan Ass'n v. Blaisdell, 290 U.S. 398, 78 L. ed. 413	19
Law v. Railroad Comm., 184 Cal. 737, 195 P. 423	19
Market St. Ry. Co. v. Railroad Comm., 24 Cal. (2d) 378, 399, 150 P. (2d) 196 (Aff'md 324 U.S. 548, 89 L. ed. 1171)	19
Napa Valley Elec. Co. v. Railroad Comm., 251 U.S. 366, 64 L. ed. 310	13
Pacific States Box & Basket Co. v. White, 296 U.S. 176, 80 L. ed. 138	20
Patton v. Administrator of Civil Aeronautics, ____ F. (2d) ____, (C.A. 9, Sept. 21, 1954)	17
People v. Western Air Lines, Inc., 42 Cal. (2d) 621, 268 P. (2d) 723	13

Pages

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 80 L. ed. 1033 19

Smyth v. Ames, 169 U.S. 466, 42 L. ed. 819 17

Southern Calif. Edison Co. v. Railroad Comm., 6 Cal. (2d) 737, 59 P. (2d) 808 13

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 81 L. ed. 510 20

United Railroads of San Francisco v. San Francisco, 249 U.S. 517, 63 L. ed. 739 10

Western Canal Co. v. Railroad Comm., 216 Cal. 639, 15 P. (2d) 853 17

Statutes

California Public Utilities Code (Cal. Stats. 1951, Ch. 764):
Section 1031 ..... 2, App. i
Section 1032 ..... 2, 8, 14, App. i
Section 1033 ..... 2, App. ii

28 U.S.C. 1257(3) 2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 531

FIALER'S LIMOUSINES, INC. and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC.,
Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California and the Public Utilities Commission of the State of California.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The decision of the California Public Utilities Commission is reported at 53 Cal. P.U.C. 263 and the

opinion and decision denying rehearing is reported at 53 Cal. P.U.C. 351. The order of the California Supreme Court denying a petition for writ of review and its order denying rehearing were not accompanied by opinions.

JURISDICTION.

The California Supreme Court denied a writ of review respecting the decision of the California Public Utilities Commission on October 13, 1954, and denied rehearing on November 10, 1954. Petition for writ of certiorari was filed January 10, 1955. The jurisdiction of this Court rests upon 28 U.S.C 1257(3).

QUESTION PRESENTED.

Has the California Public Utilities Commission the authority and power to grant a certificate of public convenience and necessity, after hearing, to a carrier to operate in a territory already served by a certificate holder, after it has made a finding, based upon substantial evidence, that the existing certificate holder is not able to provide a service to the satisfaction of the Commission?

(California Public Utilities Code, Section 1032, Appendix.)

STATUTES INVOLVED.

California Public Utilities Code, Sections 1031, 1032 and 1033. (See Appendix.)

STATEMENT.

Barrett Garages, Inc. (hereinafter referred to as "Barrett") filed with the Public Utilities Commission of the State of California (hereinafter referred to as the "Commission") two companion applications for a certificate of public convenience and necessity to operate as a passenger stage corporation for the transportation of passangers and their baggage between San Francisco International Airport, located in San Mateo County, California, and the cities of San Francisco, Oakland, Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, California. The applications were limited to the transportation of passengers having prior or subsequent transportation by air and any person accompanying such passenger.

Fialer's Limousines, Inc. (hereinafter referred to as "Fialer's") and Airline Ground Transportation Association, Inc., the petitioners herein, appeared in the proceedings and the public hearings as protestants to the granting of such a certificate. Fialer's at all times herein concerned and presently has a certificate of public convenience and necessity to transport airline passengers between the City of Oakland and the San Francisco Municipal Airport (Mills Field) in San Mateo County, between San Francisco and San Francisco Municipal Airport, San Mateo County, and between San Francisco Municipal Airport and the cities of Burlingame, San Mateo, Belmont, San Carlos, Redwood City, Menlo Park and Palo Alto, and has conducted such a business for many years past.

The City and County of San Francisco (hereinafter referred to as the "City and County") in July, 1950, awarded Fialer's a contract for a period of three years, providing the exclusive right to conduct the passenger service between San Francisco Municipal Airport and points outside its limits. This contract has expired by its terms, and had so expired prior to the filing of the Barrett applications.

Evidence adduced at the hearing before the Respondent Commission is to the effect that the San Francisco International Airport is owned by the City and County in fee simple and that it permits the use of roads thereon only for airport business and has not dedicated them as public highways.

The City and County constructed a new San Francisco International Airport, with the terminal building located approximately one mile distant from the old terminal building which Petitioner Fialer's had served. The new terminal building is approximately three-fourths of a mile from the public highway known as Bayshore Freeway.

The new airport terminal was scheduled to open in August, 1954. On April 9, 1954, the City and County called for bids on a contract for the exclusive handling by ground transportation of passengers arriving at the new San Francisco International Airport, for a term of ten years from its opening. The bids were to be for a percentage of the gross revenue, with ten (10%) percent being the minimum. Petitioner Fialer's bid the minimum ten (10%) percent. Barrett

bid sixteen and twenty-five hundredths (16.25%) percent. Because of this latter bid, the City and County on May 18, 1954 entered into a contract with Barrett concerning ground transportation of passengers at San Francisco International Airport.

The pertinent provisions of this contract as stated in the Commission decision and opinion (Petition for Writ of Certiorari, Decision No. 50229, Appendix pp. 2-4) are, that:

"1. Barrett Garages, Inc., shall have the sole and exclusive privilege to conduct a ground transportation service for air-line passengers between the Airport and points outside its limits, provided that such transportation originates on or about the Airport premises.

"2. In connection with such service Barrett Garages, Inc., shall have:

(a) The use of paved areas on the Airport to which it may be assigned by the San Francisco Public Utilities Commission for parking its vehicles.

(b) The use of designated roads and driveways of the Airport as authorized by such Commission for the conduct, operation and maintenance of such service.

(c) The use of space in the Terminal Building[2] for the conduct, operation and maintenance of its offices.

(d) The right to install and operate signs on the Airport for the purpose of identi-

[2]The newly constructed Terminal Building is located approximately one mile distant from the existing airport terminal and approximately ¾ of a mile from the new Bayshore Freeway.

fying it and informing the public of the service offered by it.

"3. Barrett Garages, Inc., shall pay a fee of sixteen and 25/100th per cent (16.25%) of the gross revenues received through the operation of such service (including the gross revenues derived from the operation of its metered taxicabs and chauffeur-driven limousines) or the sum of $48,000 per year, whichever is the greater.

"4. The San Francisco Public Utilities Commission shall:

(a) Prohibit any carrier other than Barrett Garages, Inc., from loading or picking up passengers for hire in vehicles used primarily for the transportation of airline passengers within the confines of the Airport, except licensed public interurban bus carriers operating on a regular schedule under State authority and loading and unloading at stops other than loading areas assigned to Barrett Stages, Inc.

(b) Shall not license or permit any such interurban bus carrier to load or unload on the loading or unloading platforms or ramps of the Terminal Building.

(c) Shall prohibit any person, firm, or corporation conducting the type of service exclusively reserved to Barrett Garages, Inc., from using space in the Terminal Building, or from installing signs, or having starters, guides, clerks and solicitors in the Airport.

"5. The term of the agreement shall commence on the first day of operation of the Terminal Building and shall end ten years thereafter unless service is terminated by the happenings of certain events therein set forth."

To enable it to perform this contract, Barrett filed said applications with the Respondent Commission, requesting a certificate of public convenience and necessity, which was granted after public hearing, by said Decision No. 50229, on July 6, 1954 (Petition for Writ of Certiorari, Appendix, p. 1).

Petitioner Fialer's certificate of public convenience and necessity granted to it by the Commission authorizes it to conduct operations to and from the old airport terminal, which has now been supplanted by the new terminal. Fialer's has not filed an application with the Commission requesting authority to extend its operation to the new terminal, located approximately a mile or more distant from the old. There has been no showing by Fialer's that it has any authority to operate to the new terminal facilities.

The evidence received before the Commission was conclusively to the effect that it would not be practical to utilize one company for transportation from the airport and another company to the airport; and that a single transportation company operating in both directions was preferable. (Petition for Writ of Certiorari, Appendix, p. 5, Commission Decision No. 50229.)

Before the Respondent Commission and the Supreme Court of California, Petitioner Fialer's has

contended that the City and County, by contract with Barrett, cannot exclude it from utilizing the roads and terminal facilities within the airport property; and that Section 1032 of the Public Utilities Code (Appendix) requires that the Commission deny Barrett's application for a certificate of public convenience and necessity, because said contract is invalid.

ARGUMENT.

I. SUMMARY.

In a few succinct statements this case may be summarized as follows:

For a number of years Petitioner Fialer's had enjoyed an exclusive privilege granted to it by contract with the City and County of going upon the land of the San Francisco Municipal Airport, for the purpose of picking up incoming air passengers and transporting them to designated termini. This privilege was ended by the expiration of the term of the contract. The airport property is owned in fee simple and operated by said City and County, and the roads therein are not dedicated to the public. When the matter of a new contract for the service at the new San Francisco International Airport was opened for bidding, Fialer's was outbid for the privilege by Barrett. Now, by some legal legerdemain, Fialer's contends that it may impose itself upon the City and County without benefit of any contract or franchise and compel the latter to grant Petitioner Fialer's a permanent monopoly, and that Respondent Commission is required by

law to deny to Barrett a certificate to perform the service in question. In actual fact, the issue raised by the petition now before this Honorable Court is just that simple.

II. PETITIONER FIALER'S HAS NOT BEEN DEPRIVED OF ANY RIGHTS.

Petitioner Fialer's still possesses the certificate of public convenience and necessity that the Respondent Commission granted to it; nothing has been done in any manner to revoke or limit this operating authority. Fialer's has never requested to enlarge this authority to include the new airport terminal. If Petitioner Fialer's is certain of its legal rights, why does it not attempt to operate the service to and from San Francisco International Airport? This, it has not done. The Respondent Commission has done nothing to prevent Fialer's from offering this service from the terminal. Such action, necessarily, would have to be taken by the City and County. Petitioner Fialer's did not see fit to apply to the Respondent Commission for authority to operate from and to the new airport. Therefore it cannot complain of prejudice resulting from its own inaction.

The City and County owns and operates the airport in its proprietary capacity as distinguished from its governmental capacity.

Coleman v. City of Oakland, 110 Cal. App. 715, 720, 295 P. 59.

In this proprietary capacity the City and County would be free to operate its own ground passenger service, if it desired; hence there is nothing to prevent it from giving by contract to a private party the exclusive right to do business on the same proprietary property.

Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186, 192, 56 P. 893.

In the case of *United Railroads of San Francisco v. San Francisco*, 249 U.S. 517, 521, 63 L. ed. 739, 747, it was held that the City of San Francisco had the right to parallel the tracks of a public utility to whom it had granted a franchise for use of the streets. This Court stated:

> "Of course, so far as the harm to the plaintiff is an inevitable consequence of the city's doing what the plaintiff's franchise did not make it unlawful for the city to do, the infliction of that harm is not a taking of the plaintiff's property that requires a resort to eminent domain."

In *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 296, 50 L. ed. 192, 200, the Pennsylvania Co. made an arrangement with the Parmelee Transfer Co. giving the latter the exclusive right to pick up railroad passengers in the Chicago Station. Directly in point with the facts herein, this Court stated:

> "Here the defendants press the suggestion that they are entitled to the same rights as were accorded by special arrangement to the Parmelee Transfer Company. They insist, in effect, that as carriers of passengers they are entitled to transact their business at any place which, under the

authority of law, is devoted primarily to public uses—certainly at any place open to another carrier engaged in the same kind of business. But this contention, when applied to the present case, cannot be sustained. The railroad company was not bound to accord this particular privilege to the defendants simply because it had accorded a like privilege to the Parmelee Transfer Company; for it had no contractual relations with the defendants, and owed them as hackmen no duty to aid them in their special calling. The defendants did not have or profess to have any business of their own with the company. In meeting their obligations to the public, whatever the nature of those obligations, the defendants could use any property owned by them, but they could not, of right, use the property of others against their consent. In maintaining a highway, under the authority of the State, the first and paramount obligation of the railroad company was, as we have already said, to consult the comfort and convenience of the public who used that highway. To that end it could use all suitable means that were not forbidden by law. In its discretion it could accept the aid or stipulate for the services of others. But, after providing fully for the wants of passengers and shippers, it did not undertake, expressly or by implication, to so use its property as to benefit those who had no business or connection with it. It is true that by its arrangement with the railroad company the Parmelee Company was given an opportunity to control, to a great extent, the business of carrying passengers from the Union Passenger Station to other railway stations and to hotels or private houses in Chicago. But in a real, sub-

stantial, legal sense, that arrangement cannot be regarded as a monopoly in the odious sense of that word, nor does it involve an improper use by the railroad company of its property. That arrangement is to be deemed, not unreasonably, a means devised for the convenience of passengers and of the railroad company, and as involving such use by the company of its property as is consistent with the proper performance of its public duties and its ownership of the property in question. If the company by such use of its property also derived pecuniary profit for itself, that was a matter of no concern to the defendants and gave them no ground of complaint."

This Honorable Court has adhered to these views in *Black and White T. & T. Co. v. Brown and Yellow T. & T. Co.*, 276 U.S. 518, 72 L. ed. 681.

The law of California is also in accord with the case cited.

Demeter v. Annenson, 80 Cal. App. (2d) 48, 180 P. (2d) 998.

III. PETITIONERS HAVE BEEN HEARD.

Petitioner Fialer's has been extensively heard upon the question of whether or not the City and County-Barrett contract is valid. First, this very question was raised as an issue at the public hearings before the Commission orally and by briefs; then the question was reconsidered upon a petition for rehearing filed with the Commission. Secondly, the same ques-

tion was again considered by the California Supreme Court upon petition for writ of review and finally upon petition for rehearing. Therefore, two distinct tribunals have actually considered the question a total of four separate times, with four identical decisions resulting.

The inference is drawn by Petitioners that because the Supreme Court of California has not written an opinion explaining the reasons for its ruling, Petitioners have thereby been deprived of a hearing. Such is without merit. The question of the validity of the contract was presented to that Court by petition for writ of review. Regarding the very question, this Honorable Court in *Napa Valley Elec. Co. v. Railroad Commission*, 251 U.S. 366, 372, 373, 64 L. ed. 310, 313, 314, held that a denial by the California Supreme Court of an application for a writ of review to this Commission is "tantamount to a decision of the court that the orders and decisions of the Commission did not exceed its authority or violate any right of the several petitioners under the Constitution of the United States or of the State of California," and that the "absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company". To the same effect see:

People v. Western Air Lines, Inc., 42 Cal. (2d) 621, 630-1, 268 P. (2d) 723.

Southern Calif. Edison Co. v. Railroad Comm., 6 Cal. (2d) 737, 747, 59 P. (2d) 808.

IV. THE COMMISSION HAS STRICTLY COMPLIED WITH SECTION 1032, PUBLIC UTILITIES CODE.

Under Section 1032 of the California Public Utilities Code (Appendix), if that section is applicable, the Respondent Commission was required to hold a hearing upon the application of Barrett, which it did. Next it was required under the same section, to find that the existing passenger service (Fialer's) serving the "territory will not provide such service to the satisfaction of the commission". In unequivocal language the Respondent Commission, based upon evidence, found: "that Fialer's Limousines, Inc., will not be able to provide a ground transportation service in connection with the San Francisco International Airport to our satisfaction". (See Decision No. 50229, Petition for Writ of Certiorari, Appendix, p. 7.) Certainly, this amounts to strict compliance with said Section 1032, Public Utilities Code, by the Commission. Again, we wish to point out that the authority theretofore granted to Fialer's did not comprehend operations to the new airport.

For any person to properly perform the service involved, it is necessary to have two legal rights; first, a certificate of public convenience and necessity to operate on the public highways and, second, the right from the City and County to pick up passengers at the airport. As hard as Petitioner Fialer's may try, the most it can possibly show is that it has the original certificate granted by the Commission to serve the old airport terminal, and that is the only legal right it possesses. It now has no contract right to serve either the old or the new airport terminal.

When Fialer's contracted and accepted the exclusive right from the City and County in July, 1950, to serve the terminal at the then existing airport, it accepted the right knowing by the very terms of the contract it would expire in three years. It took the chance that at the end of the contract period it would be able to have it renewed. Fialer's was not successful in such renewal, so now it contends that no one else may contract with the City and County for this privilege. It most certainly is not the function of the Commission to exert its power and authority to frustrate the contract between Barrett and the City and County and to pressure the latter into renewing its contract with Petitioner Fialer's. Unquestionably, this would be a perversion of the Commission's power and would be unlawful.

V. THE PUBLIC INTEREST AND THE END RESULTS OF PETITIONERS' CLAIMS.

The dilemma in which Petitioner Fialer's, by its contentions, would like to place the parties concerned and the public is:

Fialer's, so it contends, could operate its service upon the public highways and deliver passengers to the airport but could not pick up any passengers at the airport (Fialer's appears to contend that it may do so in certain instances) because it has no contract with the City and County. While Barrett could pick up passengers at the airport, it could not transport them over the public highways because it would not

have a certificate of public convenience and necessity from the Commission. Meanwhile, impaled neatly upon the horns of the dilemma would be the interested public seeking ground transportation from the airport. Of course, the public could, if necessary, walk three-fourths of a mile with its baggage to the public highway and board Fialer's buses.

If the Public Utilities Commission of the State of California created or allowed such a condition to exist, it would be derelict in its duties. However ludicrous this situation may appear, it is exactly what the Petitioner is seeking to create by means of its petition for writ of certiorari herein.

Petitioners seem to place great faith in the authority of *The Chicago Junction Case*, 264 U.S. 258, 68 L. ed. 667. That case involved an order of the Interstate Commerce Commission permitting one carrier to acquire control of another. This Court held such an order was void if the finding that the acquisition was in the public interest had been made without supporting evidence; that facts known by the Interstate Commerce Commission as to the public interest, but not put in evidence, would not support such an order. In the case now before this Honorable Court, the record is replete with evidence of the public need for the ground transportation service which Barrett can furnish. (See Decision No. 50229, Appendix, Petition for Writ of Certiorari.)

The Respondent Commission must exercise its power for the protection of the rights of the interested

public, and it most certainly was acting to protect the public interest when it granted Barrett a certificate of public convenience and necessity.

Smyth v. Ames, 169 U.S. 466, 544, 42 L. ed. 819, 848.

Hanlon v. Eshleman, 169 Cal. 200, 202, 146 P. 656.

Western Canal Co. v. Railroad Commission, 216 Cal. 639, 647, 15 P. (2d) 853.

VI. REPLY TO CONTENTION THE CONTRACT IS UNLAWFUL UNDER THE COMMERCE CLAUSE.

Petitioners cite the single case of *Patton v. Administrator of Civil Aeronautics,* ..... F. (2d) ..... (C.A. 9, September 21, 1954) as authority for the principle that the contract of the City and County and Barrett may be invalid as an interference with interstate and foreign commerce. The most charitable statement that can be made regarding the case cited is that it is not in point. The action involved:

> "* * * a transportation service, including tours of areas of considerable apparent magnitude, for the benefit of tourists who come to Alaska by air and arrive at the airport. Transportation for this service has been paid for before arrival at various places in the United States where the tourists bought their original tickets, which had been sold and contracted for weeks and months ahead of time. The operation of plaintiff constitutes part of a general tourist service."

The court stated:

> "Apparently the defense is that the property at the Fairbanks International Airport is owned and exclusively operated by the government. But the complaint does not show this. The trial judge does not mention such a factor in the opinion. If this is a salient fact, it should have been set up as a defense.
>
> "* * * Such an operation might not fall within the purview of a regulation of taxicabs for local haulage. If it did not, the exclusion of plaintiff even from a government owned airport might be deemed arbitrary and unreasonable interference with interstate and foreign commerce.
>
> "The facts as to this operation as a part of interstate and foreign commerce should have been developed at trial or by firm admissions in a case stated or definitive pre-trial order, since under the allegations of the complaint it might be concluded that defendants were acting beyond the scope of their authority."

The Court of Appeals directed that the Motion to Dismiss the complaint be denied and the plaintiff be given an opportunity to amend the complaint. The use of this case as an authority herein may be likened to a drowning man grasping for straws.

VII. PRIVATE RIGHTS AND INTERESTS MUST GIVE WAY TO THE LAWFUL EXERTION OF THE POLICE POWER.

The authority exercised by the Commission in this case is purely legislative and is based upon the police power. The lawful exercise of the police power may impair or destroy vested property rights. How much more true is this principle when applied against a privilege granted by the State, such as Fialer's certificate of public convenience and necessity.

Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 434-444, 78 L. ed. 413, 426-432.

East New York Savings Bank v. Hahn, 326 U.S. 230, 231-234, 90 L. ed. 34, 35-37.

Law v. Railroad Commission, 184 Cal. 737, 739-740, 195 P. 423.

VIII. DECISIONS OF THE COMMISSION ARE SUPPORTED BY A STRONG PRESUMPTION OF VALIDITY THE SAME AS A STATUTE ENACTED BY THE LEGISLATURE.

In weighing Petitioners' contention of invalidity of the decision of the Commission, this Honorable Court must ever keep in mind that said decision is supported by a strong presumption of validity.

St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 53, 80 L. ed. 1033, 1042.

Market St. Ry. Co. v. Railroad Commission, 24 Cal. (2d) 378, 399, 150 P. (2d) 196. (Affirmed 324 U.S. 548, 89 L. ed. 1171)

Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. ed. 333, 345.

The Commission is a constitutional body to which has been delegated certain legislative authority and its decisions, in the execution of such legislative authority, have at least the same force and effect as a statute enacted by the Legislature under the police power. All the presumptions of validity which surround a statute enacted by a state legislature, based upon an exertion of the police power, support the decisions of the Commission. The test of validity applicable to such a statute applies with at least the same force and effect to the validity of the decisions of the Commission.

Bluefield Water Works, etc. Co. v. Public Service Commission, 262 U.S. 679, 683, 67 L. ed. 1176, 1179.

Grand Trunk Western Railway Co. v. Railroad Commission of Indiana, 221 U.S. 400, 403, 55 L. ed. 786, 787.

Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185-186, 80 L. ed. 138, 146.

Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 69, 81 L. ed. 510, 518.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Dated, San Francisco, California,
January 28, 1955.

Respectfully submitted,

EVERETT C. MCKEAGE,
Chief Counsel,
RODERICK B. CASSIDY,
Assistant Chief Counsel,
HAROLD J. MCCARTHY,
Senior Counsel,
HALSEY L. RIXFORD,
Assistant Counsel,
Attorneys for Respondents.

(Appendix Follows.)

Appendix

CALIFORNIA PUBLIC UTILITIES CODE:

Section 1031:

No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation, but no such certificate shall be required of any passenger stage corporation as to the fixed termini between which, or the route over which, it was actually operating in good faith on July 29, 1927, in compliance with the provisions of Chapter 213, Statutes of 1917, nor shall any such certificate be required of any person or corporation who on January 1, 1927, was operating, or during the calendar year 1926 had operated a seasonal service of not less than three consecutive months' duration, sight-seeing buses on a continuous sight-seeing trip with one terminus only. Any right, privilege, franchise, or permit held, owned, or obtained by any passenger stage corporation may be sold, assigned, leased, mortgaged, transferred, inherited, or otherwise encumbered as other property, only upon authorization by the commission.

Section 1032:

Every applicant for a certificate shall file in the office of the commission an application therefor in the form required by the commission. The commission may, with or without hearing, issue the certificate as

prayed for, or refuse to issue it, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the rights granted by the certificate such terms and conditions as, in its judgment, the public convenience and necessity require. The commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation or corporations serving such territory will not provide such service to the satisfaction of the commission.

Section 1033:

The commission, in the exercise of the jurisdiction conferred upon it by the Constitution of this State and by this part, may grant certificates of public convenience and necessity, make decisions and orders, and prescribe rules affecting passenger stage corporations, notwithstanding the provisions of any ordinance or permit of any city, county, or city and county, and in case of conflict between any such order or rule and any such ordinance or permit, the certificate, decision, order, or rule of the commission shall prevail.

Subject Index

	Page
Introduction	1
Petitioner's point is a recent invention	4
The issue was not joined at the trial	4
Sections 1032 and 1033 of the California Public Utilities Code are not applicable	7
The contention that the contract is invalid under the commerce clause of the Constitution of the United States has been improperly raised in the instant petition	17
The predicament facing Fialer's results from its failure to outbid Barrett Garages for the contract	20
As to petitioners' Point "3", that "Petitioners' bus properties have been confiscated contrary to due process of law"	21
Conclusion	22

Table of Authorities Cited

Cases	Pages
Donovan v. Penn. R. R. Co., 199 U.S. 279, 50 L.Ed. 192...	13
Miami Beach Airline Service, Inc. v. C. H. Crandon, 32 So. (2d) 153, 172 A.L.R, 1425.....	14
Patton v. Administrator of Civil Aeronautics, U. S. Court of Appeals, 9th Cir. (unreported).....	19

Codes	
Government Code, Section 50474.....	10
Public Utilities Code:	
Section 1032	7, 8
Section 1033	7, 8, 9
Section 1732	17

Constitutions	
California Constitution:	
Article XI, Section 7½.....	9
Article XII, Section 23.....	10, 12

Rules	
Revised Rules of the Supreme Court of the United States, Rule 23-1(f)	18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 531

FIALER'S LIMOUSINES, INC., and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC.,
Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California, et al.,
Respondents.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, AND BARRETT GARAGES, INC., IN OPPOSITION TO THE PETITION OF FIALER'S LIMOUSINES, INC., AND AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC., FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

This brief, in opposition to the petition herein, is filed by the real parties in interest, namely, Barrett Garages, Inc., and the City and County of San Francisco.

INTRODUCTION.

This is a remarkable case to find its way to this Court.

For several years Petitioner, Fialer's Limousines, Inc., enjoyed a contract with the City and County of San Francisco, giving it the *exclusive* right to collect air line passengers at the *old San Francisco Airport* and deliver them to their points of destination.

It won that contract by being the highest responsible bidder. It held a certificate from the State Public Utilities Commission permitting it to use the highways between San Francisco and that particular airport. The term of its exclusive contract expired last year. (R. p. 172.)

Respondent Barrett Garages, Inc., by competitive bidding secured from the City and County of San Francisco a lease, giving it the exclusive right to conduct a *"U-Drive" business* at the same *old airport*. When Barrett's lease expired, Petitioner, Fialer's, outbid Barrett's and secured the exclusive lease, ousting Barrett's. This Court never received a protesting petition from "Barrett's". (R. p. 45.)

When "Fialer's" exclusive contract to pick up airline passengers at the *old airport* expired, the City and County of San Francisco having constructed its new *"International Airport"*, called for bids for a new contract covering its new airport. Fialer's bid the minimum amount of 10% of gross revenues, and Barrett's bid 16¼% thereof, and as the highest responsible bidder the latter secured the same kind of

contract that Fialer's had been enjoying for several years, with the exception that Fialer's contract dealt with the old airport and Barrett's with the new. It is rather significant that Petitioners nowhere mention the two airports.

Naturally Barrett's applied to the Public Utilities Commission of the State of California for a certificate to use the highways between San Francisco and its *new* International Airport, and secured the same, as Fialer's had done under similar circumstances some years before.

Fialer's resisted Barrett's application on the ground that Fialer's, having performed adequate service in the preceding years, was entitled to monopolize that service from now on, and that Barrett's should not be given the right to use the State Highways, to enable it to perform its contract with the said city and county.

The petition to this Court is the "follow-up" of Fialer's efforts to carry on an exclusive right to pick up air line passengers at the *new* International Airport, irrespective of any contract with the City and County.

In other words, Fialer's submitted its bid and now contends that although it was the unsuccessful bidder, it has the right to go forward performing the same service, and pay the City and County of San Francisco nothing therefor.

Petitioner, Airline Ground Transportation Association, Inc., is merely going along "for the ride". Its

interest is the fact that Fialer's is a member of their organization and, after all, an organization must come to the rescue of its members.

PETITIONER'S POINT IS A RECENT INVENTION.

Petitioner, Fialer's, was hard put to find a possible ground for petitioning this busy Court, so they make one point; namely, that it was denied due process by the Public Utilities Commission of the State of California, because that Commission refused (according to petitioner's counsel) to consider the point of invalidity of the contract between the City and County of San Francisco and respondent, Barrett Garages, Inc., the successful bidder.

THE ISSUE WAS NOT JOINED AT THE TRIAL.

Issues are made at the trial. When the matter of the successful bid of Barrett Garages, Inc., was brought to the attention of the Public Utilities Commission of the State of California, it was Mr. Matthew, attorney for petitioner, Fialer's, who suggested its introduction. Mr. Matthew said:

> "May I suggest if I may, of course you can offer for the record the copy of the invitation for bids or the proposals here to which Barrett bid and Fialer's bid were responsible." (R. p. 30.)

When Mr. Vaughan, counsel for Respondent Barrett Garages, Inc., suggested that the call for bid was

not competent or material because "the bids were closed—the successful bidder got the contract", Mr. Matthew retorted, "I am not questioning that at all." (R. p. 30.) And later in the course of the trial, Mr. Matthew stated: "Your Honor, there is no issue as to the acceptability of the bid. However, the City has the right to accept the bid." (R. p. 375.)

It is, of course, an elementary rule of law that a reviewing Court will not consider any point not raised in the hearing before the trial tribunal.

This main point of petitioners was the invention of the moment. From a reading of the transcript of the hearing before the Public Utilities Commission of the State of California, it must be apparent that petitioner's able counsel had no such theory when the case was tried. No where did petitioners, in the trial before the Public Utilities Commission, object that the Commission refused to pass on any point raised by petitioners, and nowhere in the record is there a request of petitioners to have the Public Utilities Commission consider the validity of the contract. And the point was not raised in Fialer's brief before the Public Utilities Commission following the hearing.

On page 23 of petitioners' brief, as protestants, before the Public Utilities Commission of California, we find the following:

> "Applicant Barrett's has a contract, having been the highest bidder. But the contract confers no rights as to the inter-city transportation of passengers. It is nothing more than a prelude

to resort to this Commission for the necessary operating authority."

In fact, petitioner, Fialer's, wanted a contract with the city for a term of years. It didn't want the State Public Utilities Commission to hold that the City had no power to enter into such contracts. As we have just said, Fialer's has been enjoying the monopoly at the old Airport for years under a contract with the City and County of San Francisco, and used that fact in preventing a competitor encroaching upon its privileges at the old Airport. We find in petitioners' brief as protestant, filed with the Commission, the following:

> "As Mr. Holmes (the executive head of Fialer's) has testified, Fialer's Limousines, Inc. will be prepared to negotiate a new contract with the City and County of San Francisco, if this should be desired, and the negotiation of such a contract appears to present no difficulty of either legal or practical moment. Thus the public need for uninterrupted and convenient service will not be in jeopardy."

And, on page 17 of the same brief, we find petitioner, Fialer's, admitting that San Francisco has the right to contract with reference to the use of the airport, in the following statement:

> "* * * Moreover, the law is likewise well settled that the City and County of San Francisco may not prevent Fialer's Limousines, Inc. from picking up passengers and their baggage on the airport grounds for transportation from the airport when this service is furnished *in response to pre-*

vious requests from passengers or their representatives." (Emphasis ours.)

And, finally, still recognizing the force of the contract of Barrett Garages, Inc., petitioners have, as said protestants, on page 22 of their brief said:

"In view of the substantial consensus of these holdings there can be no question of the right of Fialer's Limousines, Inc. to have convenient access to the San Francisco Airport *for the discharge of passengers* desiring to board airplanes, or of its right to place its equipment at the airport for the transportation of incoming air line passengers from the airport to San Francisco or any other point, *provided merely as to the latter that this is responsive to previous request.*" (Emphasis ours.)

In view of this state of the record, it is rather startling to see five questions presented on page 3 of the petition, all of which purport to deal with the validity of the contract between the City and County of San Francisco and Barrett's.

SECTIONS 1032 AND 1033 OF THE CALIFORNIA PUBLIC UTILITIES CODE ARE NOT APPLICABLE.

In a footnote on pages 4 and 5 of the petition, counsel cite many cases from other states as authority for the proposition that a state commission cannot grant a certificate to a new operator unless it has found deficiencies in service, etc., and cite *Section 1032* of the

Public Utilities Code of the State of California to the effect that:

> "The Commission may, after hearing, issue a certificate to operate in a territory already served by a certificate holder under this part only when the existing passenger stage corporation, or corporations, servicing such territory will not provide such service to the satisfaction of the Commission".

And, from this they argue that since Fialer's *had* been giving adequate service when its contract with the City and County of San Francisco was still in existence, no new operator was entitled to a certificate even though the applicant succeeded Fialer's as the contractor with the City and County of San Francisco. To reach this conclusion, petitioners substitute for the word "will" in Section 1032 of the Public Utilities Code of California, the word "has" or "had". The State Public Utilities Commission would not be interested in the character of service performed before unless it was established that the same service would be continued. Fialer's no longer had the contract and, of course, could not without having a contract with the City with reference to its own airport, satisfactorily take care of the passenger situation at the airport.

Now as to Section 1033:

Petitioners contend that the Commission erred in concluding that a certificate should be granted to Barrett's solely by reason of "the ground transportation

service contract entered into by the City and County of San Francisco and Barrett's on May 18, 1954", and in refusing to follow the provisions of Section 1033 of the Public Utilities Code:

There are no negative provisions in *Section 1033 of the Public Utilities Code.* That section merely states that the Commission "*may* grant certificates of public convenience and necessity, make decisions and orders, and prescribe rules affecting passenger stage corporations, notwithstanding the provisions of any order or permit of any city or county, or city and county", and the section goes on to say that if there is any conflict between any such order or rule and any such ordinance or permit, the certificate, decision, order or rule of the Commission shall prevail. The certificate of the Commission *does not conflict* with any order or permit of the City and County of San Francisco and, therefore, is not defective in that regard.

This power of the City and County to regulate its airport is not predicated upon any orders or any permit issued by a city, or a city and county. The Charter of the City and County of San Francisco is State law. It does not become a charter until approved by the State Legislature, but once approved, as set forth in Section 7½ of Article XI of California's Constitution, it, to quote from said Section 7½, "shall become the organic law thereof, relative to the matters therein provided, and shall supersede * * * all laws inconsistent with such Charter, relative to the matters provided in such Charter".

Section 23 of Article XII of Constitution of the State of California creating the jurisdiction of the Public Utilities Commission, contains the following proviso:

> "this Section shall not affect the right of any City and County * * * to grant *franchises for public utilities* upon the terms and conditions and in the manner prescribed by law." (Emphasis, of course, ours.)

Included under the term "public utilities", as used in Section 23, is "equipment within this State for the transportation or conveyance of passengers". (at beginning of Section 23.)

There is nothing in the Constitution or the statutes of the State which gives the California State Public Utilities Commission any authority over privately-owned roads on San Francisco's Airport. Section 121 of the San Francisco Charter which is, as hereinabove stated, a statute of the State of California, provides that the Public Utilities Commission of the City and County of San Francisco "shall have charge of * * * the management, supervision * * * and control of all public utilities * * * owned * * * by the City and County, including airports, for the purpose of supplying any public utilities service to the City and County and its inhabitants, to territory outside the limits of the City and County * * *"

Section 50474 of the Government Code reads in part as follows:

> "In connection with the erection or maintenance of such airports or facilities, a local agency may:

(a) Regulate the receipt, deposit and removal, and the embarkation or debarkation of passengers or property to and from such landing places or moorage.

* * * * * * *

(f) Regulate the use of the airport and facilities and other property or means of transportation within or over the airport.

* * * * * * *

(h) Enter into contracts or otherwise cooperate with the Federal Government or other public or private agencies."

As to the roads on the airport property, Mr. James H. Turner, manager of utilities for the San Francisco Public Utilities Commission, was asked at the hearing before the State Public Utilities Commission the following question by Mr. Matthews, attorney for Fialer's:

"Q. One further question, and that is about the roads into and out of the terminal as set forth in the map received in evidence as Exh. No. 2—are those to be public roads?"

To which Mr. Turner gave the following answer:

"A. No. San Francisco Airport is fully owned, fee simple property ownership. Roads have been constructed by the Public Utilities Commission, and we will control them in every respect". (R. p. 39, lines 12-19.)

And later, under Mr. Matthews' cross-examination, Mr. Turner stated:

"It is our plan to maintain full ownership and permit the full use of the roads for merely air-

port business and not dedicate them as public highways". (R. p. 40, lines 2-9.)

Under redirect examination by Mr. Reginald Vaughan, Mr. Turner testified that "if the use of those roads within the airport by any member of the public would interfere with the carrying out of the obligations of the City and County, under any contract", the City would deny such use. (R. p. 46, lines 3-7.)

As to the Seventh Alleged Error, that the Commission erred in its decision by refusing to be governed by or even to consider Section 23 of Article XII of the Constitution of the State of California:

Counsel quote from that section of the Constitution the following language:

> "From and after the passage by the legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this state, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the railroad commission; * * *"

But they failed to include the proviso at the end of the section, which reads as follows:

> "provided, further, that *this section shall not affect the right of any city and county or incorporated city or town to grant franchises for*

public utilities upon the terms and conditions and in the manner prescribed by law."

Since the San Francisco International Airport is on the ground owned by the City and County of San Francisco in a proprietary capacity, the City and County of course, had a right to enter into exclusive contracts looking towards the proper care of the passengers going to and coming from that airport.

This right of an owner to give such exclusive contracts has been passed upon many times.

In *Donovan v. Penn. R. R. Co.,* 199 U.S. 279, 50 L.Ed. 192, the Supreme Court of the United States supported the Pennsylvania Railroad Co. in its exclusive deal with the Parmelee Transfer Company in Chicago, giving that company the exclusive right to remove incoming passengers of the railroads, and enjoined competing cab companies from going into the depot and there soliciting business.

Justice Harlan, in rendering an opinion in the case, said:

> "It would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve, primarily, the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its

station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily, as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers."

There is a "cow case" in the books. The Supreme Court of Florida in *Miami Beach Airline Service, Inc., v. C. H. Crandon,* 32 So. (2d) 153 (172 A. L. R. 1425) upheld the right of a county port authority (which was vested by statute with the power to acquire and operate a commercial airport) to grant to a cab and baggage company the exclusive concession to solicit and transport passengers from the airport to points in and about the city and between airline ticket offices in the airport when requested by the airlines using the airport to do so. The commissioners brought action to enjoin another airline service from soliciting passengers for hire within the property known as Miami International Airport, and from loading passengers for hire into its busses on said property, and to have declared the contract between the port authority and the Red Top Cab and Baggage Company a valid contract.

It was the contention of the Miami Beach Airline Service that the exclusive license given the Red Top conflicted with the Certificate of Public Convenience and Necessity granted appellant by the Florida Railroad Commission. The Supreme Court readily disposed of the matter of the conflict by stating that the

Certificate of Public Convenience and Necessity gave the Miami Company the right to proceed to the entrance of the airport only, while the city's contract with the Red Top involved rights within the airport itself.

The Court upheld the contract with the Red Top as valid. In doing so, it took into consideration that the function of the port authority, with reference to the airport, was "essentially proprietary and in no respect governmental." The Court's reasoning is contained in the following language:

> "When given authority to do so a governmental entity is expected to perform a proprietary function under like rules and regulations as those pursued by private individuals. No one would contend that a private or a public service corporation would be barred from entering into an exclusive contract like that involved here if the necessities of its business required. When county commissioners are clothed with a proprietary function wherein they are responsible to the public for prompt and efficient service, it necessarily follows that they must be clothed with power to enable them to meet such requirements and we think the act in question does this."
>
> * * * * * * *
>
> "When a governmental entity is authorized to exercise a power purely proprietary, the law leans to the theory that it has full power to perform it in the same efficient manner as a private person would do."
>
> * * * * * * *
>
> "The right of Common Carriers and Terminal Companies to grant exclusive contracts to solicit

patronage at railroad stations has been generally approved throughout the country. See *Thompson's Express & Storage Co. v. Mount*, 91 NJ Eq 497, 111 A 173, 15 ALR 356, where many cases are cited supporting this rule. The fact that the airport involved in this litigation was owned and operated by the Dade County Port Authority would make no difference in the rule."

Since the roads on the airport grounds leading to the San Francisco International Airport are private roads, the utilization of them can be controlled by contract between the City and County of San Francisco and a passenger carrier. Such a contract was made and the exclusive privilege of carrying on a passenger-carrying business from the Airport was awarded under bids to Barrett Garages, Inc. In paragraph 6(a) of the contract the Public Utilities Commission of San Francisco, in agreeing to prohibit any carrier other than Barrett's to load or pick up passengers for hire, makes an exception of licensed public interurban bus carriers "operating on a regular schedule under State authority and loading and unloading at stops other than the loading areas assigned to company on Airport". The paragraph then goes on to read that *"City agrees not to license or permit any such interurban bus carrier to load or unload on the loading or unloading platforms or ramps of the terminal building, or to use the same in any manner"*. It would be strange, indeed, if the City and County, having entered into such a contract could not protect Barrett's, the contracting party, in the exclusive privilege awarded it, and prevent

Fialer's, the disgruntled bidder, from obstructing Barrett's in the exclusive use of those terminal facilities.

THE CONTENTION THAT THE CONTRACT IS INVALID UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES HAS BEEN IMPROPERLY RAISED IN THE INSTANT PETITION.

In the instant petition, petitioners have for the first time asserted that the contract is unlawful under the Commerce Clause of the United States Constitution because it grants a monopoly to Barrett Garages of interstate and foreign commerce which "may well be 'deemed arbitrary and unreasonable interference with interstate and foreign commerce' ". (Pet., p. 14.)

Since this ground was not set forth in the petition for rehearing filed with Respondent Commission, it cannot be urged before this or any other Court. This is specifically provided in Section 1732 of the California Public Utilities Code, which reads as follows:

> "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any grounds not so set forth in the application."

Furthermore, the rules of this Court require that:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of

first instance (e.g., Respondent Commission) and in the Appellate Court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them * * * and the way in which they were passed upon by the Court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears * * * as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (Revised Rules of the Supreme Court of the United States, Rule 23-1[f].)

It is respectfully submitted that this rule has not been complied with in respect to the asserted ground that the contract is involved as creating a monopoly in Barrett Garages which may result in an arbitrary and unreasonable interference with interstate and foreign commerce.

During the period when Fialer's served the old airport under that contract, which carried such exclusive privileges, it relied upon this fact in proceedings before Respondent Commission where others attempted to obtain certificates of public convenience and necessity to serve the old airport as well as the Oakland Airport under a similar exclusive contract with that city, contending that a city has the right to regulate its own airport and "has the power to exclude all operators except one, if they desire to do so". (R. pp. 232 et seq., 488.)

In other words, during the period when it rendered service to and from the old airport and the Oakland Airport, Fialer's enjoyed a monopoly in ground transportation services by virtue of contracts similar in terms to that which it now attacks as being invalid because the contract undertakes "to grant to Barrett a monopoly of this interstate and foreign passenger traffic."

The object on the part of Fialer's in protesting the application of Barrett Garages was to eliminate the latter from the field. Had Fialer's been successful, it would have continued to enjoy the same monopoly it now condemns. Would the enjoyment of the same monopoly be lawful by Fialer's and unlawful by Barrett Garages, particularly when such monopoly would be exercised by both operators subject to the regulation and control of Respondent Commission?

Petitioners' citation of the unreported decision of the U. S. Court of Appeals for the 9th Circuit, in *Patton v. Administrator of Civil Aeronautics,* is not at all in point. The facts stated in that opinion are not comparable to the facts in this case, and the decision decided nothing.

THE PREDICAMENT FACING FIALER'S RESULTS FROM ITS FAILURE TO OUTBID BARRETT GARAGES FOR THE CONTRACT.

By its failure to obtain the contract by submitting the highest bid, Fialer's (a) deprived itself of the exclusive privilege to solicit and originate traffic at the new airport and (b) even assuming but not admitting that it possesses the right to serve the new airport in a limited sense, thereby rendered itself incapable of providing an adequate and satisfactory service to the public.

Fialer's should have foreseen these consequences at the time it submitted its bid. Instead, Fialer's assumed that there would be no bidder other than itself and fixed the price it would pay at the bare minimum which would be entertained by the City under its "Call for Bids", which was not enough.

On pages 10 to 12 Petitioners' argue that a right to a hearing involves "due process", and the denial of a hearing is a lack of "due process", here again overlooking the fact that a hearing was had before the State Public Utilities Commission and any issues raised at the trial were heard. Of course, petitioners cannot contradict the fact that there was no express or specific finding on an issue *not raised by them at the trial.* They talk of the refusal "to consider evidence introduced", overlooking the fact that they offered no evidence as to the invalidity of the contract but always considered that the City and County of San Francisco had the power to contract for the use of its facilities at its new International Airport.

AS TO PETITIONERS' POINT "3", THAT "PETITIONERS' BUS PROPERTIES HAVE BEEN CONFISCATED CONTRARY TO DUE PROCESS OF LAW".

The first sentence under this heading in the petition illustrates petitioners' disregard of the state of the record which was made before the Public Utilities Commission of the State of California. It reads:

> "The immediate consequence of the action of the Commission in assuming the validity of the San Francisco-Barrett contract, *accepting the testimony of the Barrett witnesses* that only one operator can effectively serve the airport and in granting a certificate to Barrett to provide that service is that the Fialer's bus properties, heretofore devoted to the airport service have lost most of their value. (Emphasis ours.)

Mr. Gene E. Holmes, president of petitioner, Fialer's, admitted that it was not practicable for one bus company to handle outgoing traffic, and another incoming traffic (R. p. 184, line 22 to p. 185, line 1); so, it did not require the testimony of any of Barrett's wtnesses to establish before the Commission that "only one operator can effectively serve the airport".

Petitioners' plea for sympathy leaves us cold. Fialer's has, of course, taken depreciation on its buses to date and can still sell them for their depreciated value. Furthermore, when Fialer's entered into the contract with the City and County of San Francisco in 1950 for exclusive rights to serve the old airport for a three year period, it should have appreciated the

limitation of this period and amortized its investment over that period. This was probably done; at least, we can assume so, since Fialer's had an opportunity during the course of the hearings to introduce revenue and expense figures resulting from the service under its contract with the City and County of San Francisco, but did not avail itself of the opportunity, doubtless because the revelation of such figures would have disclosed that it had earned excessive profits under the contract.

If Fialer's had intended to rely upon this plea of monetary loss from the sale of its equipment, why didn't it introduce such figures in evidence. Nothing of record shows that the buses are worth $250,000 or any other figure.

CONCLUSION.

These petitioners have not been denied a hearing. They have had a fair hearing and ample opportunity to show why the contract in question was invalid but, during the hearings, did not urge or assign the grounds of invalidity now presented before this Court.

Under the belief that no one else would bid against it, (Tr. p. 244) Fialer's submitted a bid of 10% of gross revenue which was, as declared in the "Call for Bids", the minimum percentage which would be entertained. That was Fialer's mistake. Barrett Garages outbid Fialer's by 6.25%, having submitted a bid of 16.25% of gross revenue.

Fialer's gambled that it would be the only bidder—it lost that gamble and cannot now complain.

We submit that the petition should be denied.

Dated, San Francisco, California,
February 2, 1955.

Respectfully submitted,

DION HOLM,
City Attorney of the City and County of San Francisco,

THOMAS M. O'CONNOR,
Public Utilities Counsel of the City and County of San Francisco,

FRANK J. NEEDLES,
Deputy City Attorney of the City and County of San Francisco,

Attorneys for the City and County of San Francisco and the Public Utilities Commission of said City and County.

JAMES FARRAHER,
REGINALD L. VAUGHAN,
GEORGE A. STOCKFLETH,
Attorneys for Barrett Garages, Inc.

SULLIVAN, ROCHE, JOHNSON & FARRAHER,
VAUGHAN, PAUL & LYONS,
Of Counsel.

In the Supreme Court of the United States

OCTOBER TERM 1954

No. 531

FIALER'S LIMOUSINES, INC. and AIRLINE GROUND TRANSPORTATION ASSOCIATION, INC.,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and PETER E. MITCHELL, JUSTUS F. CRAEMER, KENNETH POTTER and VERNE SCOGGINS, the members of and constituting the Public Utilities Commission of the State of California,

Respondents.

Reply Brief for Petitioners

The brief of the respondent Commission makes it clear that the Commission issued its certificate to Barrett solely on the basis of the San Francisco-Barrett contract, intending and expecting that the Barrett service would displace Fialer's service thereby destroying the going concern value

of Fialer's bus properties. Fialer's cannot complain, the Commission argues, because:

1. The Commission heard Fialer's on the question of the validity of the San Francisco-Barrett contract. But that so-called "hearing" consisted of a summary refusal by the Commission to consider Fialer's arguments—followed by an express *assumption* by the Commission that the contract was valid.

2. Fialer's was heard as to the validity of the contract by the Supreme Court of California when that court declined to issue its writ of review. But petitioners refuse to believe that their constitutional right to a hearing can be brushed aside on the bold assertion that an unsuccessful request for a hearing is itself the hearing requested—that there is no difference between having a hearing and requesting a hearing which is denied. Surely this is novel doctrine. *Napa Valley Co. v. Railroad Commission,* 251 U.S. 366 (1920) makes no such suggestion. That case is concerned entirely with problems of *res judicata* relating to a prior proceeding in which, presumably, all parties were heard. The Court does not in any manner suggest that a refusal to issue a writ is itself a hearing. Compare the careful consideration given by this Court to the related problem of the effect of a refusal to grant certiorari. See *Darr v. Burford,* 339 U.S. 200 (1950); *Brown v. Allen,* 344 U.S. 443 (1953).

3. The Commission represents that it has made the finding, "based upon evidence," that Fialer's "will not be able" to render satisfactory service. But this ignores the circumstance that Fialer's asserted inability to render satisfactory service has been created by the Commission itself in first determining to issue a certificate to Barrett, over the objection of the existing certificate holder. Thus the Commission assumes a decision that a certificate is to be issued to Bar-

rett upon which to rest its finding that the certificate should issue. This is not due process of law.

4. Fialer's is not entitled to operate to and from the new terminal building. This argument is both trivial and disingenuous. The Commission in its opinion makes no such suggestion and obviously Fialer's certificate authorizing its airport operation grants the right to operate to and from the airport, not to and from a particular building at the airport.

5. Fialer's has no rights since San Francisco could lawfully exclude Fialer's from the airport premises—in other words, that the San Francisco-Barrett contract is valid. But this is the very issue on which the Commission has specifically refused to consider Fialer's position. The fact that the Commission at long last recognizes that this is the critical question in the case—the very question on which Fialer's has not been heard—is a reason to grant this writ, not to deny it.

The Commission does not deny that Fialer's is entitled to due process of law. The Commission does not deny that it issued the Barrett application solely because of the San Francisco-Barrett contract and the Commission now belatedly recognizes that the validity of that contract is the basic issue in the case. The Commission cannot deny that it refused to consider Fialer's position on that issue and that the Supreme Court by refusing to issue its writ of review made the action of the Commission in that connection effective.

Thus this case is just what petitioners have always said it is: a case in which an administrative tribunal has issued an order with no evidence to support it except an invalid contract, at the same time refusing to hear or decide the

question of the validity of that contract. This is not due process of law.

Dated: February 1, 1955.

Respectfully submitted,

ALLAN P. MATTHEW
WALKER W. LOWRY
ROLAND J. HENNING
Attorneys for Fialer's Limousines, Inc.

DOUGLAS BROOKMAN
Attorney for Airline Ground Transportation Association, Inc.

McCUTCHEN, THOMAS, MATTHEW, GRIFFITHS & GREENE
Of Counsel.